Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

Comments

DJE Teleconsulting, LLC (DJE), in response to the Commission's "Notice of Proposed Rulemaking,"[1] hereby offers certain, specific recommendations in connection with the regulation of services employing IP technology.

Core Principle

First and foremost, the Commission should proceed promptly to determine to what extent it would regulate IP-enabled offerings *with a view toward extending like or equivalent regulation to all substitutable services*. Regulation should not vary among competitors based on the identity of the service provider or the nature of the underlying technology or facilities used to furnish service. Accordingly, substitutable service offerings should be subject to the same regulation, whether it involves the full panoply of "Title II" regulation, no regulation at all, or some level of "in-between" regulation.[2]

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[1] FCC 04-28, rel. March 10, 2004 (hereinafter, "NPRM"),

[2] The Commission should not rely on "Title I" authority. That authority sometimes is used inappropriately to regulate a service or function not expressly covered under the Communications Act. *See Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796 (DC Cir. 2002). In fact, Title I merely establishes Commission purposes, definitions and internal procedures, and does not at all provide a sound basis on which to regulate.

Asymmetric regulation should be avoided if the over-arching Commission goal is to enhance competition and benefit consumers to the maximum extent possible. Perverse results would ensue from a regulatory approach that allowed *some* industry participants to become superior competitors -- not because of the merits of their offerings -- but, rather, because of favorable regulatory treatment conferring on them cost-savings and operational efficiencies not available to their competitors.[3]

Background

In comments addressing Vonage's pending "Petition for Declaratory Ruling,"[4] DJE asked the Commission to do precisely what it has done, namely, initiate a comprehensive proceeding to address the regulatory questions surrounding "Voice over Internet Protocol" ("VoIP") technology. The Commission's challenge now is to complete this proceeding promptly and furnish the regulatory certainty that is so lacking in today's environment. Such certainty will allow investment and other business-related decisions to be made and carried out that likely will affect the U.S. telecom industry for years to come.

The issues to be decided are complex. The Commission must decide what aspects of current "Title II" regulation should be applied to those employing IP technology.[5] If it were to decide *not* to extend such regulation to these

[3] The Commission wisely seems to reject this "handicapping" approach when it indicates that, "[a]s a policy matter," it will treat equally "any service provider that sends traffic to the PSTN," irrespective of where the traffic originates. NPRM at 33.

[4] DJE Teleconsulting "Comments," dated October 27, 2003.

[5] Traditionally, it should be noted, the underlying network facilities used to provide telecommunications capabilities – copper wire, microwave, satellite, fiber, etc. – were irrelevant in ascertaining the regulatability of the services using those facility-types.

services, the Commission could label them "information services," or it could treat them as forborne "telecommunications services."[6] Whichever regulatory route it chooses, however, the Commission must also take the steps necessary to assure that asymmetric regulation does not result.

There are few entities that want to be regulated, and those that do probably should be viewed with skepticism. Most seek to avoid regulation because it invariably leads to delays, uncertainties and higher costs.[7] Avoiding these results undeniably leads to increased competitiveness because lower prices and faster market responses can occur, to the benefit of consumers. And, when *all* those offering substitutable services can benefit from less regulation, consumer benefits are even more pronounced.

It appears from recent public statements that some commissioners are not inclined to apply full Title II regulation to services employing VoIP technology.[8] This makes eminently good sense because, otherwise, a mind-numbing array of Commission rules and regulations under Title II would apply, resulting in the increased cost and complexity of doing business.[9]

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[6] The Commission must exercise care when labeling offerings "information services," even though that approach may be the simplest way to avoid a duty to regulate directly. This is because, under Section 64.702 (a) of the Commission's Rules and precedents thereunder, an "information service" consists of a telecommunications service component to which Title II obligations attach. *See Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[7] *See, e.g.*, Luncheon Remarks of FCC Commissioner Kathleen Q. Abernathy, "Regulating Wireless: How Much and By Whom," AEI-Brookings Joint Center for Regulatory Studies, May 13, 2004, at 6: " … [R]egulation by its nature imposes costs, creates unintended consequences, and restricts competitors' abilities to respond quickly to consumer demand."

[8] A term being used to describe this lesser regulation is "regulation-lite."

[9] Part 64 of the Commission's Rules – "Miscellaneous Rules Relating to Common Carriers" – consists of twenty-seven subparts and nearly 100 pages of regulations. In addition to these

The Jurisdiction Issue

With regard to jurisdiction, the Commission, with the support of Congress, if necessary, should assume *exclusive* regulatory jurisdiction over VoIP services and, additionally, substitutable non-VoIP services. This will eliminate the costs and confusion that would result from varying and inconsistent state regulation and, importantly, would accommodate a major characteristic of VoIP service, namely, that physical boundary locations are largely irrelevant because of an inability to determine where VoIP calls originate and/or terminate. In addition, this approach should discourage VoIP service providers from moving their business operations "off-shore" and beyond the reach of U. S. authorities.

This exclusive federal regulatory jurisdiction, however, should *not* apply for tax purposes. States and localities rely heavily on tax revenues derived from telecommunications services, and there is no reason to deprive them of these revenues simply because of changing technology. Thus, state and local taxation should be allowed to continue subject to the same caveat pertaining to regulation, specifically, that all providers of substitutable services be treated the same.

Areas of Federal Regulation

Current Commission regulation of entities providing telecommunications services under traditional technologies can be classified under "money" or "non-money" headings. Because this regulation remains in effect, it must be presumed that the public interest requires its continuation, at least for *some*

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requirements, there are others as well, including marketplace exit; tarifling or service information publication; network reliability; and various reporting and record keeping requirements.

providers of substitutable services. As noted herein, however, whatever regulation the Commission decides to retain should apply uniformly to all providers of substitutable services. Therefore, the Commission should utilize this proceeding to evaluate that current regulation with a view toward retaining, modifying or eliminating it for all.

Money Issues

"Economic Regulation." No VoIP provider -- or any provider of substitutable services -- should be subjected to rate regulation or the regulation of its service terms and conditions. The competitive marketplace can be relied upon to lead to just, reasonable and non-discriminatory rates, charges and service terms. In addition, the Commission should eliminate remaining tariff-filing requirements and, instead, subject service providers to the requirement of making available to the public information about their offerings.

Intercarrier Compensation. Service providers reliant on the Public Switched Telephone Network (PSTN), either at the originating or terminating end of a call, or both, should be required to pay reasonable compensation to those furnishing end-user access via the PSTN. To determine reasonable compensation, the Commission should expeditiously conclude on-going proceedings addressing the issue. Importantly, and consistent with these recommendations, the same compensation scheme and levels should apply to *all* providers of substitutable services utilizing the PSTN, a result the Commission seems to embrace.[10]

[10] *See* n. 3. *supra*.

Universal Service and other Regulatory Charges. To the extent Universal Service and other Commission funding programs need to be continued, they must apply equally to *all* providers of substitutable services on a competitively neutral basis. Exempting altogether some service providers from contribution requirements or imposing varying charges on different competitors should not take place because such an approach would confer competitive advantages on some at the expense of others. Therefore, the imposition of funding obligations on service providers to support universal service, to recover the costs for numbering administration, to support telecommunications relay services, and to recover the shared cost of long-term number portability should be borne equally by all competitors.[11]

Non-Money Issues

As noted above, there is a mind-numbing array of Commission rules and regulations applicable to entities currently providing common carrier telecommunications services. Most are concentrated in Part 64 of the Commission's rules, although many are strewn throughout Title 47 of the Code of Federal Regulations. Below is a non-exhaustive list of the areas of regulation the Commission should evaluate in this proceeding. Some pertain to the public health and safety, while others involve rights deemed to be important to consumers. Whatever regulatory requirements the Commission decides to retain should be reviewed to determine whether *voluntary* industry implementation and compliance might render any continued formal regulation unnecessary. There is

[11] All service providers should file FCC Form 499-A's, as well as quarterly reports, to determine contribution amounts needed to fund these programs.

marketplace evidence that, with regard to IP-enabled offerings, E-911 and CALEA law enforcement requirements could be satisfied voluntarily through the entrepreneurial undertakings of those who see business opportunities arising from "new technology" and "old regulation."

E911	Privacy (CPNI)
CALEA compliance	Service information/tariffing
Disability access	Network reliability
Service priority restoration	Truth-in-billing
	Pay-per-call
	Caller-ID/CPN

Conclusion

The Commission should adopt the approaches toward regulation recommended herein. Competition and consumers will benefit from an availability of substitutable services unburdened by heavy or asymmetric regulation.

Respectfully submitted,

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